

IN THE SUPREME COURT OF THE STATE OF NEVADA

LESLIE EUGENE GRAHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51584

FILED

APR 30 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

On September 12, 1997, the district court convicted appellant, pursuant to a jury verdict, of first-degree murder. The district court sentenced appellant to serve a term of life in the Nevada State Prison without the possibility of parole. This court affirmed appellant's conviction and sentence on appeal. Graham v. State, 116 Nev. 23, 992 P.2d 255 (1999). The remittitur issued on March 23, 2000.

On February 15, 2001, appellant filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On April 8, 2008, the district court denied appellant's petition. This appeal followed.

In his petition below, appellant claimed that he received ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice

such that counsel's errors were so severe that they rendered the jury's verdict unreliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697.

Appellant argues that the district court erred in denying his claim that trial counsel was ineffective for failing to present expert medical testimony in support of his theory of second-degree murder. Appellant claims that he was prejudiced by trial counsel's performance because the district court denied appellant's request for jury instructions on second-degree murder because there was no evidentiary support. By definition, a murder occurring during the perpetration of child abuse is first-degree murder. 1995 Nev. Stat., ch. 168, § 1, at 257 and ch. 443, § 44, at 1181-82. Appellant argues that second-degree felony murder is a lesser included offense to first-degree murder if it is shown that the death occurred as a result of neglect. See Sheriff v. Morris, 99 Nev. 109, 118-19, 659 P.2d 852, 859 (1983) (concluding that a defendant can be charged with second-degree felony murder if the victim died during an inherently dangerous felony committed by the defendant that is not one of the enumerated felonies constituting first-degree felony murder). Appellant argues that the failure of trial counsel to present expert evidence that the child's death was caused by neglect rather than abuse constituted ineffective assistance of counsel.

Based on our review of the record on appeal, we conclude that appellant failed to demonstrate that he was prejudiced by trial counsel's performance. We concluded on direct appeal that the evidence presented

at trial was only consistent with a finding of either guilty of child-abuse murder or not guilty. Graham, 116 Nev. at 31, 922 P.2d at 259. In his petition, to support his theory of second-degree murder, appellant provided the unsworn, unsigned affidavit of Dr. Todd Grey which stated that the injuries suffered by the child were consistent with child abuse, but that if the person who was watching the child was not the one who caused the injuries, then that person was only unreasonable in not seeking help for the child.

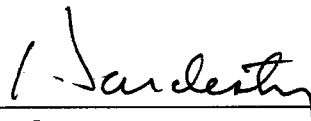
The district court found this unsigned, unsworn declaration by Dr. Grey equivocal and unpersuasive. We agree. Even if this unsworn, unsigned affidavit was sufficient to show appellant was neglectful in not seeking medical treatment, appellant has not alleged that someone else committed the child abuse. His theory at trial was that the child received her injuries from falling from a bed. Testimony at trial and the affidavit provided in appellant's petition, support the conclusion that the injuries to the child were caused by child abuse. Therefore, appellant failed to provide sufficient evidence that had trial counsel presented Dr. Grey's statement that there was a reasonable probability that the district court would have allowed instructions on second-degree murder or that the jury would have found appellant guilty of second-degree murder rather than first-degree murder. Therefore, the district court did not err in denying this claim.

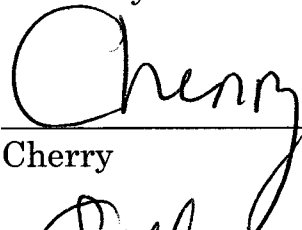
Appellant also argues that the district court erred in denying his claim that trial counsel was ineffective for failing to secure a second-degree murder instruction. He argues that this failure to have a second-degree murder instruction given at his trial created a "mandatory presumption" that appellant was guilty of first-degree murder. Appellant


appears to argue that the first-degree murder instructions directed the jury to find a presumed fact against the accused, however, appellant failed to explain what this presumed fact is. Regardless, appellant's claim lacks merit. Trial counsel requested instructions on second-degree murder. The district court refused that request, and this court upheld that decision on direct appeal. We explained that murder by child abuse is first-degree murder as a matter of law under NRS 200.030(1) and therefore, "such murders do not fall within the category of murder that can be reduced in degree by failure to prove deliberation and premeditation. Nor can such a murder be reduced in degree because it is committed without intent to kill and would otherwise fall within the ambit of [second-degree felony murder]: if done with malice and in an enumerated manner, the killing constitutes first-degree murder by legislative fiat." Graham, 116 Nev. at 28-29, 992 P.2d at 258. Therefore, because the only evidence adduced at trial demonstrated that the child's death was caused by child abuse, we held that appellant was not entitled to second-degree murder instructions. Moreover, it appears that the district court instructed the jury on involuntary manslaughter. While we concluded on direct appeal that it was error for the district court to give the involuntary manslaughter instruction, id. at 31, 992 P.2d at 260, the giving of the instruction belies appellant's claim that the jury was only given first-degree murder instructions. Under the circumstances and considering our decision on direct appeal, appellant's trial counsel was not deficient nor was appellant prejudiced by trial counsel's failure to secure second-degree murder instructions in the instant case, and therefore, the district court did not err in denying this claim.

Having considered appellant's claims and for the reasons set forth above, we conclude that appellant is not entitled to relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Hardesty


_____, J.
Cherry


_____, J.
Saitta

cc: Hon. Kenneth C. Cory, District Judge
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk